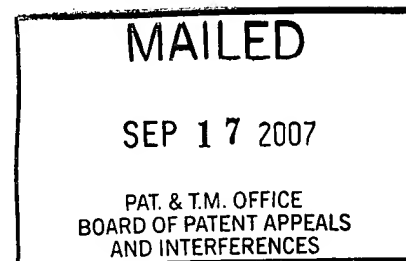


UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte Meltzer et al.

Application No. 09/173,858
Appeal No. 2006-1639



DECISION ON PETITION

This is a decision on a Petition Under Rule 183 For (1) Second Rehearing With Suggestion For Expanded Panel; and (2) Oral Argument, filed July 23, 2007. The Petition requests a second rehearing with an expanded panel and oral argument and, on the merits, reversal of the claim rejections. Alternatively, the Petition requests that the application be remanded to the examiner for consideration of newly presented evidence. The Petition will be treated as a petition to the Chief Administrative Patent Judge under 37 C.F.R. § 41.3.

FINDINGS OF FACT

1. On August 31, 2006, the Board of Patent Appeals and Interferences (Board) entered a Decision (Original Decision) affirming the rejection of the claims on appeal.
2. On October 30, 2006, Appellants filed a Request for Rehearing, including newly presented evidence and associated new arguments.

3. On May 21, 2007, the Board entered a Decision on Rehearing denying Appellants' request to change the Original Decision and stating that "[p]ursuant to 37 C.F.R. ¶ 41.52(a)(1), we have no discretion to consider the new evidence and associated new arguments submitted by Appellants with the Request for Rehearing." Decision on Rehearing at 7. The Board also noted that "if Appellants wish to have the newly presented evidence considered by the Examiner, the proper procedure is to file a Request for Continued Examination (RCE) under 37 C.F.R. § 1.114." *Id.*
4. On July 23, 2007, at the same time as filing this Petition, Appellants also filed a Request for Continued Examination Following Appeal along with the evidence newly presented with the Request for Rehearing and additional newly presented evidence.

DISCUSSION

MPEP § 706.07(h)(XI)(A) states:


The filing of an RCE (accompanied by the fee and a submission) after a decision by the Board of Patent Appeals and Interferences, but before the filing of a Notice of Appeal to the Court of Appeals for the Federal Circuit (Federal Circuit) or the commencement of a civil action in federal district court, will also result in the finality of the rejection or action being withdrawn and the submission being considered.

Even if an RCE is considered conditional upon some other action, "the Office will treat the 'conditional' RCE and payment as if an RCE and payment of the fee set forth in 37 CFR 1.17(e) had been filed." MPEP § 706.07(h)(III)(C).

Thus, to the extent that Appellants may consider the RCE conditional upon denial of the Petition, it is clear that the RCE takes precedence over the Petition, rendering the latter moot.

DECISION

For the foregoing reasons, the Petition is **DISMISSED** as moot and the application is returned to the Examiner for processing of the RCE.



Michael R. Fleming
Chief Administrative Patent Judge
Board of Patent Appeals and Interferences

Application 09/173,858
Appeal No. 2006-1639

Ernest J. Beffel, Jr.
Haynes Beffel & Wolfeld LLP
P.O. Box 366
Half Moon Bay, CA 94019

Telephone: (650) 712-0340
Facsimile: (650) 712-0263